

IN THE SUPREME COURT OF IOWA

No. 22-0385
POLK COUNTY NO. CVCV061992

ENVIRONMENTAL LAW AND POLICY CENTER OF IOWA,
ENVIRONMENTAL COUNCIL and SIERRA CLUB,
Petitioners-Appellants,

vs.

IOWA UTILITIES BOARD,
Respondent-Appellee,

and

OFFICE OF CONSUMER ADVOCATE and MIDAMERICAN
ENERGY COMPANY, Intervenors-Appellees.

APPEAL FROM THE DISTRICT COURT FOR POLK COUNTY,
THE HONORABLE SAMANTHA GRONEWALD, JUDGE

PROOF REPLY BRIEF OF INTERVENOR
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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. THE IOWA UTILITIES BOARD'S INTERPRETATION AND APPLICATION OF IOWA CODE SECTION 476.6(19) IS OVERLY NARROW AND CONTRARY TO THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE

Case Law

Irving v. Employment Appeal Bd., 883 N.W.2d 179 (Iowa 2016)

West Virginia v. EPA, 597 U.S. ---, 2022 WL 2347278 (June 30, 2022)

Statutes

Iowa Code § 17A.19(10)

Iowa Code § 475A.2

Iowa Code §§ 476.6 (13), (15)

Iowa Code §§ 476.6(1)–(10)

Iowa Code § 476.6(19)

Iowa Code § 476.8

Iowa Code § 476.33

Iowa Code § 476.53

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In Re MidAmerican, EEP-2018-0002, OCA Davison Testimony, pgs. 12–14 (IUB Sept. 13, 2018)

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ARGUMENT

I. THE IOWA UTILITIES BOARD’S INTERPRETATION AND APPLICATION OF IOWA CODE SECTION 476.6(19) IS OVERLY NARROW AND CONTRARY TO THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE

In their briefs, both the Iowa Utilities Board (IUB) and MidAmerican Energy Company (MidAmerican) present an improperly constrained and narrow interpretation of Iowa Code section 476.6(19) (2021) that is contrary to the clear and unambiguous language of the statute. *See Irving v. Emp. Appeal Bd.*, 883 N.W.2d 179, 191 (Iowa 2016) (stating a court’s statutory analysis begins with an analysis of whether the words of the statute are clear). The Board’s and MidAmerican’s interpretations of 476.6(19) also run counter to the other “rate-making” sections contained in 476.6. OCA will reply to each in turn.

A. The Clear and Unambiguous Language of 476.6(19) Contemplates the Consideration of Alternative Methods for Managing Regulated Emissions

The clear and unambiguous text of Iowa Code section 476.6(19) contemplates a comprehensive process for managing regulated emissions from coal fueled generation facilities operated by Iowa rate-regulated public utilities. Section 476.6(19) requires the Office of

Consumer Advocate (OCA) to participate in the “collaborative effort” that developed MidAmerican’s initial EPB filed in 2001 and then in the subsequent collaborative EPB updates filed “at least every twenty-four months.” Iowa Code § 476.6(19)(a)(1). OCA and the Department of Natural Resources are required to participate in the “contested case proceeding” in which the initial plan and subsequent updates are considered by the IUB. Iowa Code § 476.6(19)(a)(3). Notably, the language in 476.6(19) provides a broad mandate for the creation of a “multiyear plan and budget for managing regulated emissions.” Iowa Code § 476.6(19)(a). The broad language of the statute does not provide granular details on what must be included in a utility’s EPB, but provides general guidance to the IUB on the findings it must make in deciding whether to approve an EPB. These findings include a review to determine if the EPB is “reasonably expected to achieve cost-effective compliance with applicable state environmental requirements and federal ambient air quality standards.” Iowa Code § 476.6(19)(c). In making this finding, the IUB must also review the EPB to determine if the plan “reasonably balance[s] costs, environmental requirements, economic development potential, and the reliability of the electric generation and transmission system.” *Id.*

The IUB argues it followed the language of the statute in approving MidAmerican’s 2020 EPB and in excluding OCA’s evidence and recommendations irrelevant to the EPB proceeding. *IUB Proof Brief*, pgs. 29–32. In support of its argument, the IUB declined to cite to language demonstrating that OCA’s recommendations and evidence were irrelevant or otherwise outside the scope of the language in 476.6(19).¹ OCA posits this is because 476.6(19) contemplates a broad emissions planning process that does not dictate the granular details of the plan, rather the statute only provides general guidance on broad elements an EPB must include to achieve IUB approval. In an attempt to deflect from the lack of statutory support for its exclusion of OCA’s evidence, the IUB mischaracterizes OCA’s argument by asserting OCA believes it “should be able to introduce any information into the docket

¹In its Order, the IUB’s finding rejecting OCA’s evidence and recommendations consists of the following three sentences:

These issues have not been raised in previous EPB dockets, and the EPBs in those dockets were found to be in compliance with the statute. Based upon the specific requirements in the statute which address compliance with state and federal emissions regulations and the approval of EPBs in previous dockets, the Board finds that the evidence addressing other options, filed by OCA and the intervenors, is outside the scope of an EPB proceeding under Iowa Code § 476.6(19).

Certified Record (CR.) pg. 1050; App.____.

it wishes and require the Board to consider it as part of the statutory process.” *IUB Initial Proof Brief*, pg. 30. However, OCA did not just “introduce any information” as it wished, rather OCA introduced evidence and recommendations with a clear nexus to managing regulated emissions—evidence OCA is allowed to submit pursuant to the clear language of the statute. *See OCA Proof Brief*, pgs. 35–37.

Relatedly, the IUB asserts MidAmerican’s 2020 EPB allowed for and facilitated collaboration between stakeholders and, contrary to OCA’s argument, that the exclusion of OCA’s evidence does not “equate to it being excluded from the EPB process.” *IUB Proof Brief*, pg. 31. OCA agrees with the IUB that the EPB process began as a generally collaborative one. Although MidAmerican improperly refused to respond to OCA’s discovery requests, OCA and MidAmerican eventually reached a collaborative settlement agreement that resolved the outstanding issues in the EPB. CR. pg. 831; App._____. However, the IUB’s decision to reject the settlement agreement while also finding the evidence and recommendations submitted by OCA were not relevant runs counter to the “collaborative” nature of 476.6(19) and the contested case proceeding requirement.

As OCA argued in its Proof Brief, a contested case proceeding contemplates parties submitting evidence within the scope of the statute and the consideration of that evidence by the decisionmaker. *OCA Proof Brief*, pg. 33. The IUB found OCA's evidence and recommendations were not relevant to the instant proceeding, but under the IUB's interpretation it is not clear what (if any) evidence OCA could submit that the IUB would find relevant to the EPB proceeding. OCA is a required party in the EPB proceedings. Iowa Code § 476.6(19)(a)(3). Under the IUB's interpretation, OCA is unable to submit evidence concerning its conclusions on the utility's EPB with recommendations on cost-effective alternatives for managing emissions. As will be discussed in the next section, OCA plays a similar role in the other rate-making sections contained in 476.6. For example, OCA participates in the utilities' five-year energy efficiency contested case proceedings by submitting evidence and recommendations concerning the utilities' filed energy efficiency plans, including OCA's recommend alternative methods of compliance. Iowa Code § 476.6(15). OCA plays the same role in the proceedings conducted by the Board for utilities' rate increase applications. Iowa Code §§ 476.6(1)–(10). The IUB's interpretation of 476.6(19) severely limiting

the evidence it will consider diminishes OCA's role in the EPB process and is contrary to the clear language of the statute.

The IUB argues its consideration of the evidence submitted by OCA would "diminish the Board's ability to implement the Legislature's intent in the EPB dockets to timely serve the public." *IUB Proof Brief*, pg. 31. Similarly, MidAmerican claims the "legislature intended the Board's review to be limited because the legislation sets a 180-day deadline for the entire proceeding." *MidAmerican Proof Brief*, pg. 15. The language of 476.6(19) does not support the conclusion the IUB should not consider OCA's and stakeholders' recommendations and evidence due to time constraints nor is this conclusion supported by the procedure used in this case. While the statute contains a one hundred eighty day deadline for the IUB to render a decision on a public utility's EPB, this deadline can be extended in thirty day increments. Iowa Code § 476.6(19)(d)(1). More importantly, the one hundred eighty day deadline does not start until after the IUB has made a finding the EPB filing is complete. Iowa Code § 476.6(19)(d).

In the instant proceeding, MidAmerican filed its 2020 EPB on April 1, 2020. CR. pg. 985; App._____. Nearly seven months later, the IUB deemed MidAmerican's EPB complete, which triggered the one

hundred eighty day deadline. Finally, On March 24, 2021, the IUB issued its final agency decision without holding a hearing—approximately twelve months after MidAmerican’s initial filing date. CR. 979–91; App._____. For context, a public utility’s application for a customer rate increase, which is generally the most complex and evidence-intensive matter the IUB considers, includes a ten-month decision deadline starting from the date the utility files its rate increase application. *See* Iowa Code § 476.33. The statutory one hundred eighty day deadline does not constrain the IUB from considering evidence relevant to a utility’s EPB submitted by OCA and other stakeholders.

Finally, while both the IUB and MidAmerican assert overly narrow interpretations of 476.6(19), MidAmerican seeks to constrain the language of the statute even further by effectively removing many of the statutory requirements if its EPB does not involve new capital expenditures. *MidAmerican Proof Brief*, pg. 32. The clear language of the statute simply does not create a carve-out limiting the scope of the process for a utility that does not seek new capital expenditures in its EPB. As OCA noted in its Proof Brief, the EPB process is not a static one and is constantly impacted by new regulations and the utility’s own planning processes. *OCA Proof Brief*, pg. 32. OCA’s evidence and

recommendations did not necessarily challenge MidAmerican's previously approved capital expenditures, but, if adopted, may have resulted in a decrease in O&M expenses proposed in MidAmerican's EPB. For example, OCA highlighted a Minnesota utility that decided to idle its coal-fueled generation in the spring and fall seasons, which are periods of lower electricity consumption. CR pg. 505; App._____. The decline in the use of the coal-fueled generation resulted in savings for customers—customers who ultimately pay for the costs associated with the EPB. *Id.*; App._____. Whether or not a utility proposes new capital expenditures, the EPB process must be followed including the contested case proceeding requirement and the consideration of alternative cost-effective methods for regulating emissions. The IUB's interpretation disallowing the consideration of OCA's evidence and recommendations is erroneous by ignoring the clear language in the statute and should be reversed by this court pursuant to Iowa Code section 17A.19(10)(c).

B. The IUB's Interpretation of Section 476.6(19) Conflicts with its Treatment of Other Similar Sections Contained in 476.6 and Constitutes Reversible Error

In its Brief, MidAmerican correctly highlights that the various provisions of Iowa Code section 476.6 broadly relate to the rates and

charges of Iowa rate-regulated public utilities, and the procedures used to establish the same. *MidAmerican Proof Brief*, pg. 14. These provisions largely provide the exclusive means for a utility to raise customers' rates.² Like section 476.6(19), the other provisions contained in 476.6 feature comparable procedures that must be followed prior to the implementation of a new rate or charge. The provisions addressing the filing of a utility's five-year energy efficiency plan (EEP) and the process and approval of a utility's rate increase application provide useful guidance on the interpretation of section 476.6(19). Iowa Code §§ 476.6(1)–(10), (13), (15); *Irving v. Emp. Appeal Bd.*, 883 N.W.2d 179, 191 (Iowa 2016) (stating statutory analysis “must strive to make sense of [a statute] as a whole and examine the “general scope and meaning of a statute when all its provisions are examined.” (citations omitted)).

² The EPB statute, section 476.6(19), is unique in one sense when compared to the other sections of 476.6 due to the fact the Iowa Legislature included language specifically requiring OCA to participate in EPB proceedings. Iowa Code § 476.6(19)(a)(3). In the other rate-increase proceedings outlined in 476.6, OCA participates as a party pursuant to Iowa Code section 475A.2. The fact the legislature included a provision in 476.6(19) specifically requiring OCA to participate in the EPB proceedings further underscores the importance of OCA's collaboration and participation in these proceedings.

Just like in the EPB process, OCA participates in the EEP process by reviewing and investigating the utility's filed EEP. OCA then submits evidence and recommendations in the form of pre-filed testimony to be considered in a contested case proceeding, as it also did in the instant proceeding. *CR.* pg. 88; App.____; *see, e.g., In Re MidAmerican*, EEP-2018-0002, OCA Davison Testimony, pgs. 12–14 (IUB Sept. 13, 2018) (recommending an alternative method for tracking program savings in MidAmerican's 2018 EEP). The IUB considered OCA's evidence and recommendations in its order approving MidAmerican's 2018 EEP. *In Re MidAmerican*, EEP-2018-0002, Final Order pgs. 11–12 (IUB Feb. 18, 2019) (Discussing OCA's testimony and recommendations). Similarly, Iowa Code sections 476.6(1) through (10) provide guidance on the procedure and process that must be followed for a utility to impose a new rate or charge on customers. OCA always participates in rate increase proceedings in the same manner as its participation in the EEPs. Iowa Code § 475A.2. OCA reviews the utility's rate increase application then files direct testimony containing evidence and recommendations, including alternatives to various aspects of the rate increase application to be considered in a contested case proceeding. *See, e.g., In Re Black Hills*

Energy Company, RPU-2021-0002, Tessier Direct Testimony, pgs. 17–18 (IUB Oct. 1, 2021) (recommending the rejection of a utility’s proposed program or, in the alternative, providing four alternative recommendations to bolster consumer protections for the program).

Relatedly, MEC highlights the language used in Iowa Code section 476.53 (outlining the process to be used for a utility’s application to impose new rates on customers for advanced ratemaking principles for new generation facilities) that expressly requires utilities to demonstrate it considered alternatives in its initial filing. *MidAmerican Proof Brief*, pg. 20. MidAmerican notes similar language does not appear “on the face of the EPB statute as written.” *MidAmerican Proof Brief*, pg. 20. MidAmerican’s argument overly simplifies the EPB process while ignoring the language used in section 476.6(19). OCA does not argue that MidAmerican’s plan as filed in April 2020 should have included a discussion of alternative compliance options. Rather, OCA argues the alternatives proposed in OCA’s testimony should have been considered by MidAmerican in the course of the collaborative EPB process. Once MidAmerican dismissed OCA’s suggestions, the IUB should have taken these recommendations and evidence into consideration when it considered MidAmerican’s

EPB. This is the process used in the other sections contained in 476.6 that also result in a new rate or charge for customers, as outlined in the energy efficiency and rate increase application examples in the preceding paragraph. The energy efficiency and rate increase provisions in 476.6 also do not contain express language requiring the utility to demonstrate a consideration of alternatives, but OCA and other stakeholders present alternatives to the utility's initial filing and these alternatives are taken into consideration when the IUB renders a decision on whether to approve the rate increase. The EPB should be treated in the same manner as the other provisions in 476.6. The IUB and MidAmerican have given no compelling reason to treat the EPB in a manner where OCA and stakeholders are barred from the IUB considering relevant evidence. The various proceedings contained in section 476.6 are incredibly important because they are the exclusive means for raising customer rates and present a singular opportunity for OCA and other stakeholders to investigate the rate increase prior to its imposition on consumers to ensure the rates are "reasonable and just"—the polestar of utility rate-making. Iowa Code § 476.8.

OCA requests this court find the IUB committed reversible error in finding OCA's recommendations and evidence were outside the

scope of the EPB statute, pursuant to Iowa Code section 17A.19(10)(c), and remand to the IUB with instructions to consider OCA's recommendations and evidence.³

CONCLUSION

OCA requests this court find the IUB committed reversible error in its interpretation of section 476.6(19), pursuant to Iowa Code sections 17A.19(10)(c) for the reasons stated in the above sections and in OCA's Proof Brief. OCA requests this court remand this matter to the IUB for further proceedings.

³ In MidAmerican's initial brief, MidAmerican conflates the instant matter with the United States Supreme Court's ruling in *West Virginia v. EPA*, 597 U.S. ---, 2022 WL 2347278 (June 30, 2022). MidAmerican correctly notes *West Virginia* arises under federal law, but is incorrect in its assertion that it is similar to the present case. MidAmerican Initial Brief, pg. 25. *West Virginia* addresses whether a federal agency (the EPA) exceeded the scope of authority granted to it by a federal statute (the Clean Air Act) in implementing an agency rule (the Clean Power Plan). *West Virginia v. EPA*, WL 2347278, at *4–5 (June 30, 2022). The present case does not involve the scope of IUB's rulemaking authority in the context of implementing a statute nor do the Environment Parties/Appellants occupy the same position as the EPA. For these reasons, OCA believes this Court should disregard MidAmerican's *West Virginia* argument or give it little weight.

Respectfully submitted,

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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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/s/ Jeffrey J. Cook

Signature

8/1/22

Date

ATTORNEY COST CERTIFICATE

I hereby certify the cost of printing the foregoing Intervenor Office of Consumer Advocate Proof Reply Brief was the sum of \$0.00.

/s/ Jeffrey J. Cook

Signature

8/1/22

Date

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies he electronically filed the foregoing Intervenor Office of Consumer Advocate Proof Reply Brief on August 1, 2022, in EDMS.

The undersigned hereby certifies on August 1, 2022, the foregoing Intervenor Office of Consumer Advocate Proof Reply Brief was served by EDMS to the respective counsel for said parties:

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